

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA JACKSON, Successor Personal
Representative of the Estate of SHIRLEY
JACKSON, Deceased,

UNPUBLISHED
January 17, 2006

Plaintiff-Appellant,

v

No. 263766
Wayne Circuit Court
LC No. 04-421501-NH

HENRY FORD HEALTH SYSTEM, a/k/a
HENRY FORD HOSPITAL, MICHAEL S.
EICHENHORN, M.D., VENCOR HOSPITAL,
a/k/a KINDRED HOSPITALS EAST, L.L.C.,
d/b/a KINDRED HOSPITAL DETROIT,
MICHIGAN HOSPITALISTS, P.C., and
MASOOD AHMAD, M.D.,

Defendants-Appellees,

and

HARPEL S. JANDE, M.D.,¹

Defendant.

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff Debra Jackson, successor personal representative of the estate of her mother Shirley Jackson, deceased, appeals as of right the trial court's order granting summary disposition in favor of defendants, Henry Ford Health System, a/k/a Henry Ford Hospital (HFHS), Michael S. Eichenhorn, M.D., Vencor Hospital, a/k/a Kindred Hospital Detroit (Vencor), Michigan Hospitalists, P.C., and Masood Ahmad, M.D. Debra Jackson claims that the wrongful death action she brought on behalf of her mother's estate was improperly dismissed on

¹ On October 1, 2004, Harpel S. Jande, M.D., was dismissed without prejudice pursuant to an affidavit of non-involvement.

grounds of res judicata, given that previous suits rooted in the same claims had been brought by a plaintiff who was not authorized to act for the estate. Debra Jackson also contends that the statute of limitations does not independently bar her present action because, as a successor personal representative, the saving clause for actions filed on behalf of an estate affords her additional time to file suit. We reverse.

I. Basic Facts And Procedural History

A. Overview

This appeal arises after a complex history of litigation on behalf of the estate of Shirley Jackson. Shirley Jackson died on or about January 4, 2000,² allegedly after being treated by each defendant or its agents. Subsequent to her death there were four separate wrongful death suits in Wayne Circuit Court. To make the situation even more confusing, the Wayne Probate Court conducted three other proceedings related to the estate of Shirley Jackson. Below we attempt to summarize the litigation in as clear and concise a fashion as possible, recognizing that this is no easy task.

B. Probate Court Action No. 1

On June 21, 2000, Rodney Pickett, Shirley Jackson's son and Debra Jackson's brother, was appointed as personal representative of Shirley Jackson's estate (Probate Court Action No. 1). On March 16, 2001, Pickett signed a sworn statement to close the estate. The statement was filed on April 20, 2001, and a certificate of completion was entered on May 31, 2001.

C. Wrongful Death Suit No. 1

On April 1, 2002 (approximately one year after the estate was closed in Probate Court Action No. 1), Pickett filed a wrongful death action in Wayne Circuit Court alleging malpractice against all defendants except Eichenhorn and Ahmad (Wrongful Death Suit No. 1). The complaint in Wrongful Death Suit No. 1 alleged that Pickett was acting as the independent personal representative of Shirley Jackson's estate. HFHS and Vencor moved for summary disposition of the case based, largely, on their argument that the estate was closed and that only the representative of a valid, open estate may bring a wrongful death action. Despite the intervening reopening of the estate, described in Probate Court Action No. 2, below, the Wayne Circuit Court determined that the reopened estate had not been in effect when Pickett filed Wrongful Death Suit No. 1 on April 1, 2002. The Wayne Circuit Court rejected Pickett's argument that he had a good faith, reasonable, albeit mistaken, belief that he was authorized to act as personal representative at the time he filed. The Wayne Circuit Court dismissed Wrongful

² The parties list Shirley Jackson's date of death alternately as January 3, 4, or 5, 2000. The precise date does not affect our analysis; thus, we use the date noted in the complaint. Note also that this Court refers to other dates of events that are not explicitly documented in the record but which the parties and the trial court appear to have assumed are accurate and which are not contested on appeal.

Death Suit No. 1 with prejudice on January 30, 2003, in response to defendants' motion for summary disposition because it concluded that the statute of limitations had expired and that there was no way for Pickett to redeem the action.

D. Probate Court Action No. 2

On October 10, 2002 (six months after he filed Wrongful Death Suit No. 1), Pickett petitioned the Wayne Probate Court to reopen the estate *nunc pro tunc* and, on October 29, 2002, he was appointed successor personal representative (Probate Court Action No. 2). The defendants in Wrongful Death Suit No. 1 filed objections. In response, the Wayne Probate Court vacated Pickett's reappointment on November 19, 2002, and allowed briefs to be filed. On December 11, 2002, the Wayne Probate Court again reopened the estate as of October 10, 2002. However, on March 26, 2003, the Wayne Probate Court reversed its decision regarding Pickett's reappointment. On defendants' objection, the Wayne Probate Court denied Pickett's previous motion to reopen the estate *nunc pro tunc* as of October 10, 2002. Like the Wayne Circuit Court in Wrongful Death Suit No. 1, the Wayne Probate Court in Wayne Probate Court Action No. 2 found that Pickett did not have a good faith belief that he was empowered to initiate a wrongful death action on behalf of the estate. Accordingly, the Wayne Probate Court found that Michigan law precludes reopening the estate and relating it back.

E. Wrongful Death Suit No. 2

Meanwhile, on November 12, 2002 (two weeks after his October 29 reappointment and seven days before the Wayne Probate Court vacated that reappointment, but one month before the Wayne Probate Court reopened the estate on December 11, 2002, relating that reopening back to October 10, 2002, and also before the Wayne Probate Court's eventual reversal of that decision), Pickett filed a second wrongful death suit in Wayne Circuit Court on behalf of the estate that named the previous defendants and added Eichenhorn and Ahmad as defendants (Wrongful Death Suit No. 2). The Wayne Circuit Court dismissed Wrongful Death Suit No. 2 on July 1, 2003, stating that "there was no Estate pending at the time of filing."

F. Probate Court Action No. 3

On May 20, 2003, Debra Jackson petitioned the Wayne Probate Court to reopen the estate and to appoint her as successor administrator. Her letters of authority for appointment as the successor personal representative were issued on June 25, 2003 (Probate Court Action No. 3).

G. Wrongful Death Suit No. 3

Presumably, because the Wayne Circuit Court had dismissed Wrongful Death Suit No. 2, Debra Jackson (after being appointed as successor personal representative on June 25, 2003 in Probate Court Action No. 3) filed her own wrongful death action in Wayne Circuit Court on behalf of the estate on August 27, 2003 (Wrongful Death Suit No. 3). The Wayne Circuit Court

dismissed Wrongful Death Suit No. 3 on March 4, 2004, without prejudice because Debra Jackson had not filed the requisite notice of intent³ and because the Wayne Circuit Court concluded that the earlier notice filed by Pickett was not sufficient.

H. Wrongful Death Suit No. 4

Accordingly, Debra Jackson sent additional notices of intent on February 6, 2004, and filed the suit under appeal here on July 14, 2004 (Wrongful Death Suit No. 4). Nonetheless, the Wayne Circuit Court, following a hearing on March 25, 2005, again granted summary disposition in favor of defendants, with an order issued April 19, 2005 stating that the dismissal was “for the reasons stated by the Court on the record.” The Wayne Circuit Court appeared to conclude that its ruling in Wrongful Death Suit No. 1 barred Wrongful Death Suit No. 4 on res judicata grounds; the Wayne Circuit Court indicated that Debra Jackson could not relitigate whether the statute of limitations had expired. The Wayne Circuit Court noted, alternatively, that Debra Jackson’s case was independently barred by the statute of limitations because the statutory saving provision that applies to wrongful death actions⁴ does not afford a successor representative an additional two years during which she may bring suit.

II. Summary Disposition

A. Standard Of Review

The court should grant a summary disposition motion pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁵ The court should grant a summary disposition motion pursuant to MCR 2.116(C)(7), when the claim is barred because of a release, prior judgment, or a statute of limitations. We review a trial court’s decision on a motion for summary disposition de novo.⁶ The Wayne Circuit Court’s ruling in Wrongful Death Suite No. 4 and the parties’ theories on appeal solely involve questions of law, which we also review de novo.⁷

³ MCL 600.2912b.

⁴ MCL 600.5852.

⁵ *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

⁶ *Graves v American Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 613; 677 NW2d 829 (2004).

⁷ *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (review of whether a suit is barred by res judicata); *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) (review of the interpretation and application of statutes); *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000) (review of whether litigation of an issue is barred by collateral estoppel); *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999) (review of whether an action is barred by the statute of limitations).

B. Statute Of Limitations

We agree with Debra Jackson that the statute of limitations did not independently bar Wrongful Death Suit No. 4. Generally, any action involving a claim based on medical malpractice must be brought either within two years of the accrual of the claim or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.⁸ MCL 600.5852 provides for an extension of the period of limitations in cases where an action involving a deceased person survives his or her death (the saving clause or saving provision). The statute allows a personal representative to bring such a suit

at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.^[9]

Defendants argue that this provision does not apply to claims that a successor representative files when a prior representative of the estate previously filed such claims. We disagree. Case law firmly establishes that a plaintiff, as a successor personal representative, has a saving period that begins at the time the successor personal representative's letters of authority are issued. In *Eggleston v Bio-Med Applications of Detroit, Inc.*,¹⁰ the Michigan Supreme Court rejected this Court's "narrow reading" to the contrary and held that a successor representative could make use of his own additional saving period. The Court stated:

The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.^[11]

We find it inapposite that in *Eggleston* the original temporary personal representative died before he was able to file suit¹² whereas, here, Pickett did attempt to file a claim but the estate already had been closed. Further, *Estate of Harris v Bolling* confirms the *Eggleston* rule. There, this Court, citing *Eggleston*, explicitly noted that "the successor personal representative could have filed a complaint *after* her appointment not *before* her appointment."¹³

⁸ MCL 600.5805(6); MCL 600.5838a(2); *Estate of Harris v Bolling*, 267 Mich App 667, 670; 705 NW2d 720 (2005).

⁹ MCL 600.5852. The parties do not contest that the statute that tolls the limitations period for medical malpractice actions when a notice of intent is filed, MCL 600.5856(c), does not similarly toll the saving provision. *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004).

¹⁰ *Eggleston*, *supra* at 31, 33.

¹¹ *Id.* at 33.

¹² *Id.* at 31.

¹³ *Harris*, *supra* at 673.

We also find this case distinguishable from *McLean v McElhaney*,¹⁴ *Amon v Botsford General Hospital*,¹⁵ and *King v Briggs*.¹⁶ In those cases, the trial courts dismissed the original, authorized personal representatives' attempts to file wrongful death actions as untimely because the personal representatives did not file the actions within two years of their respective letters of appointment and because the personal representatives did not file respective actions within the period of limitations, even after each action was afforded 182 days' tolling.¹⁷ Therefore, this case is distinguishable because Pickett was not an authorized personal representative. There is no authority for defendants' claim that Pickett's earlier attempts to bring suit represented a unique failure of diligence¹⁸ on Pickett's part that removes Wrongful Death Suit No. 4 from the rules of *Eggleston* and *Harris*.

Accordingly, in Wrongful Death Suit No. 4, Pickett's earlier failed attempts to file wrongful death claims on behalf of the estate did not deprive Debra Jackson of her additional saving period. The initial two-year period of limitation for a wrongful death action ended on or about January 4, 2002, and the three-year maximum extension that the savings clause affords yields January 4, 2005, as the last date on which any personal representative could bring the action. Debra Jackson filed Wrongful Death Suit No. 4 on July 14, 2004, which was within two years of the issuance of her letters of authority on June 25, 2003 in Probate Court Action No. 3, and was before the three-year maximum extension cutoff date. Therefore, the statute of limitations did not bar Wrongful Death Suit No. 4.

C. Res Judicata

We next address the Wayne Circuit Court's apparent conclusion that the doctrine of res judicata precludes Wrongful Death Suit No. 4. The doctrine of res judicata may bar an action if: 1) there was a prior final decision on the merits; 2) the matter contested in the second case was or could have been resolved in the first case; and 3) both actions are between the same parties or their privies.¹⁹ The purposes of the doctrine are to prevent multiple suits litigating the same cause of action and, therefore, to prevent inconsistent decisions; encourage reliance on adjudication; conserve judicial and private resources; and relieve parties of the vexation of multiple suits.²⁰ Courts have applied the doctrine not only to claims that were already litigated but also to "every claim arising from the same transaction that the parties, exercising reasonable

¹⁴ *McLean v McElhaney*, ___ Mich App ___; ___ NW2d ___ (Docket No. 257540, issued December 13, 2005).

¹⁵ *Amon v Botsford General Hospital*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2005 (Docket No. 260252).

¹⁶ See *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229).

¹⁷ *McLean*, *supra* at slip op pp 2-3; *Amon*, *supra* at slip op pp 2-3; *King*, *supra* at slip op pp 2-3.

¹⁸ *King*, *supra* at slip op p 4.

¹⁹ *Adair*, *supra* at 121.

²⁰ *Id.*; *Pierson Sand v Keeler Brass*, 460 Mich 372, 380; 596 NW2d 153 (1999).

diligence, could have raised but did not.”²¹ The party asserting that res judicata should bar a claim has the burden of proving the applicability of the doctrine.²²

Debra Jackson argues that res judicata does not preclude Wrongful Death Suit No. 4, given that the Wayne Circuit Court dismissed Pickett’s earlier suits precisely because it found he was not properly acting on behalf of the estate. Therefore, she claims, Pickett is not the same party or a privy for purposes of res judicata.

To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a “substantial identity of interests” and a “working functional relationship” in which the interests of the nonparty are presented and protected by the party in the litigation.^[23]

Here, as siblings and consecutive personal representatives of the estate, Pickett and Debra Jackson arguably had a substantial identity of interests, whether or not Pickett was later found not to have been properly acting on behalf of the estate. Moreover, a working relationship arguably inheres because the same attorney executed the relevant suits and Debra Jackson petitioned for appointment as successor representative because one or both of Pickett’s wrongful death actions was or were still pending at the time of her petition. Michigan estate law also supports the notion that a successor representative is a privy to a former representative. A successor representative “must be substituted in all actions and proceedings in which the former personal representative was a party.”²⁴ Further, “[a] claim previously barred shall not be asserted in the subsequent administration.”²⁵

However, the issue of privity is not dispositive. It is true that under some circumstances “a summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata.”²⁶ Here, however, the Wayne Circuit Court’s rulings in Pickett’s earlier cases did not address the merits of the underlying substantive claim. Most significantly, the Wayne Circuit Court *could not* have addressed the wrongful death claim, despite the fact that Pickett attempted to raise it, because the proceedings only addressed the issue of whether Pickett properly brought suit on behalf of the estate. Whether Debra Jackson has additional time during which she could bring suit presents a separate question that requires the application of different law to additional facts that Pickett could not have raised in his suits. Self-evidently, Debra Jackson had not been appointed successor until *after* the Wayne Circuit Court dismissed Pickett’s suits. Accordingly, Pickett’s earlier suits did not—and could not—

²¹ *Adair, supra* at 121.

²² *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

²³ *Adair, supra* at 122 (citations omitted).

²⁴ MCL 700.3613.

²⁵ MCL 700.3959.

²⁶ *Cleary Trust v Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004).

resolve the matters to be contested in Wrongful Death Suit No. 4. Barring Wrongful Death Suit No. 4 would not fulfill the purposes of the res judicata doctrine: it would not prevent the litigation of the same cause of action because the cause of action was never, in fact, litigated.

D. Collateral Estoppel

For similar reasons, the principle of collateral estoppel does not bar Wrongful Death Suit No. 4. Collateral estoppel precludes relitigation of an issue in a subsequent action when: 1) a question of fact which was essential to the judgment was actually litigated and determined by a final judgment; 2) the same parties or their privies had a full and fair opportunity to litigate the issue; and 3) there is mutuality in the sense that the party who seeks to take advantage of the earlier decision would have been bound by it had it gone against that party.²⁷ As discussed, even if Pickett and Debra Jackson or the estate may be considered the same parties or privies, the claims involved in Wrongful Death Suit No. 4 were never actually litigated and determined in Pickett's earlier wrongful death suits. Clearly, the Wayne Circuit Court never addressed the wrongful death claims in those suits. The prior suits also did not litigate the issue of whether the statute of limitations applies differently to a successor personal representative.

Debra Jackson, however, argues for a different application of collateral estoppel. She claims that, because defendants prevailed in Pickett's earlier wrongful death suits based on their argument that there was no open, valid estate, defendants are collaterally estopped from now arguing that Pickett previously brought wrongful death claims on behalf of the estate. We agree that the *factual issue* concerning whether Pickett was authorized to act on the estate's behalf was actually litigated and determined in the earlier suits. And we generally agree that defendants may not *now* argue that Pickett could act on behalf of the estate when he brought suit, since they took precisely the opposite position in the earlier suits. Nonetheless, there is still an unlitigated *legal question* concerning whether Pickett's acts may bind the estate or the successor representative despite Pickett's lack of authorization to bring suit.

E. Estate Code

We now turn to application of Michigan's estate code. MCL 700.3959 provides as follows:

[I]f there is . . . good cause to reopen a previously administered estate, including an estate administratively closed, . . . the court may appoint the same or a successor personal representative to administer the subsequently discovered estate. . . . *A claim previously barred shall not be asserted in the subsequent administration.* [Emphasis added.]

MCL 700.3613 requires that "[a]fter appointment and qualification, a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party." Further, wrongful death actions "shall be brought by, and in the

²⁷ *Monat v State Farm Ins Co*, 469 Mich 679, 683-685; 677 NW2d 843 (2004).

name of, the personal representative of the estate of the deceased person.”²⁸ However, the estate is the real party in interest, and the cause does not transfer over to, or become the right of, the personal representative.²⁹ Accordingly, the question that controls here is: should Pickett’s earlier dismissed wrongful death claims be imputed to the estate and, therefore, be binding on subsequent administrators?

Debra Jackson argues that, because Pickett’s wrongful death claims were dismissed precisely because he was not properly acting on the estate’s behalf, the claims may not bind the estate. We agree. We conclude that the plain language of the above estate code provisions do not support defendants’ contention that Pickett’s earlier dismissed wrongful death suits have any effect on Debra Jackson’s subsequent wrongful death claims brought on behalf of the estate. MCL 700.3613 requires that Debra Jackson be substituted in all actions and proceedings in which Pickett was a party.³⁰ However, the Wayne Circuit Court dismissed Pickett’s suits because it determined that he was no longer authorized to act as the estate’s personal representative. We do not read MCL 700.3613 to mean that Debra Jackson must be substituted in all actions brought by Pickett because at one time he acted as personal representative of the estate. Instead, we interpret the statute to mean that Debra Jackson would only be substituted in actions that a former personal representative *properly* brought in his capacity as personal representative.³¹ Similarly, the mandate in MCL 700.3959 that “a claim previously barred shall not be asserted in the subsequent administration” refers to claims brought during previous administrations of the estate or, expressed differently, to claims previously barred against the estate. Again, neither scenario applies to the Wayne Circuit Court’s dismissal of Pickett’s earlier wrongful death claims on the ground that the estate was not open at the time that Pickett initiated suit.

Indeed, this Court has explained that

an appointment as administrator after the period of limitations has expired relates back to the filing of suit *if, at the time the suit was filed, the plaintiff holds a good faith reasonable belief that he has authority to bring suit as administrator*, provided that the defendant is not prejudiced by the application of the relation-back doctrine in such situations.^[32]

Pickett was denied reappointment as personal representative because both the Wayne Circuit Court and the Wayne Probate Court determined that, at the time he filed Wrongful Death Suit

²⁸ MCL 600.2922(2).

²⁹ *Shenkman v Bragman*, 261 Mich App 412, 416; 682 NW2d 516 (2004).

³⁰ MCL 700.3613.

³¹ See *King*, *supra* at slip op p 5 (stating that a successor representative must be substituted in an action already commenced).

³² *Saltmarsh v Burnard*, 151 Mich App 476, 491; 391 NW2d 382 (1986) (emphasis added).

No. 1, he did not have the requisite good faith reasonable belief that he had authority to act on the estate's behalf.³³

“[J]ustice is best served by precluding the avoidance of a valid claim . . . by a legal technicality which does not prejudice the defendant[.]”³⁴ Therefore, we conclude that, where a purported personal representative attempts to file suit but is precluded from bringing suit because he is not authorized to bring claims on behalf of the estate, justice is not served by precluding a later, properly authorized, successor personal representative from filing suit within the time set forth under MCL 600.5852. Therefore, the rulings in Wrongful Death Suit No. 1 and Wrongful Death Suit No. 2 operated to preclude Pickett from acting as personal representative; they did not operate to bar the estate's wrongful death claims.

We reverse the Wayne Circuit Court's order granting summary disposition in favor of defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

³³ *Id.*

³⁴ *Saltmarsh, supra* at 491.